Supreme Court, U.S.
FILED
MAR 9 2001
OFFICE OF THE CLERK

No. 00-1274

IN THE
Supreme Court of the United States

VALENCIA CAMPBELL, DEAGELIA M. PEÑA, BARBARA VALENTINE, CHERYL LUCAS, TASHA MCGUTHRIE,

Petitioners,

v.

NATIONAL EDUCATION ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL EDUCATION ASSOCIATION

MAURICE JOSEPH
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W.
Washington, DC 20036
(202) 833-4000

ROBERT M. WEINBERG
Counsel of Record
LAURENCE GOLD
PAGE KENNEDY
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES — Page

Brown v. Brody, 199 F.3d 446 (D.C. Cir. 1999) 2, 3-4, 5

Doe v. Dekalb County Sch. Dist., 145 F.3d 1441 (11th Cir. 1998) 5

Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) 5

Yartzoff v. Thomas, 809 F.2d 1371 (9th Cir. 1987) 5

STATUTES

42 U.S.C. § 1981 ..... 1, 4

D.C. Code § 1-2501, *et seq.* 1

STATEMENT OF THE CASE

In November, 1991, petitioners, five minority women, brought this 42 U.S.C. § 1981 ("Section 1981") and District of Columbia Human Rights Act, D.C. Code § 1-2501, *et seq.* ("DCHRA") employment discrimination case against their employer, respondent National Education Association ("NEA"). The petitioners' complaint alleged that they had been denied promotions, and "promotion-enhancing opportunities," *e.g.* attendance at conferences, training, and "high-visibility assignments." Petitioners filed a second complaint six months later alleging retaliation in violation of the DCHRA.

After protracted proceedings, the District Court dismissed all of petitioners' Section 1981 claims—save a single promotion claim. In so doing that court ruled that the NEA actions in question—which occurred prior to the 1991 amendment broadening the scope of Section 1981—did not constitute the formation or the enforcement of a contract within Section 1981's coverage.[1] The District Court also dismissed a large number of petitioners' DCHRA claims as barred by that Act's one-year statute of limitations. The Court of Appeals affirmed both of these rulings in the decision below. *See* Pet. App. at 4a. Petitioners do not challenge either ruling here.

After further proceedings, the District Court granted summary judgment to respondent NEA as to the remainder of plaintiffs' employment discrimination and retaliation claims. Based on an exhaustive review of a full record, the District Court determined that NEA had provided legitimate, non-discriminatory and non-retaliatory reasons for each of its

---

[1] Section 1981 was amended in November 1991 to cover all "benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. 104-166, 105 Stat. 1071 (codified as amended at 42 U.S.C § 1981 (1991)).

challenged actions, and that petitioners had not identified or presented any evidence suggesting that the reasons given by NEA were not the real reasons for those actions, much less a pretext for discrimination. Pet. App. at 17a.

In a unanimous unpublished memorandum opinion, the Court of Appeals affirmed the grant of summary judgment to respondent NEA:

• First, the Court of Appeals affirmed the District Court's summary judgment ruling on petitioners' single remaining claim under Section 1981—a claim that petitioner Peña was denied a promotion. The court below ruled that in the face of the District Court's Local Rule 108(h)—requiring that the party opposing summary judgment identify specific facts creating a material factual dispute—petitioners had failed to identify any evidence rebutting NEA's explanation that the successful candidate was selected over Peña because she (the successful candidate) "was the unanimous, non-discriminatory choice of a selection panel, which included women and minorities, based on superior relevant skills." Pet. App. at 5a-6a.

• Second, the Court of Appeals affirmed the District Court's summary judgment ruling on petitioners' DCHRA claims—which alleged that they had received negative comments in otherwise positive performance appraisals, were not allowed to attend certain conferences or undertake certain professional responsibilities, were denied leave, and were excessively supervised—on two independent grounds: Under *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999), said the court below, none of these NEA actions constituted an adverse employment action violative of the DCHRA. Beyond that, petitioners had failed to establish a *prima facie* case of disparate treatment by producing evidence that similarly situated whites or males had been treated differently in any of these regards. Pet. App. at 7a-8a.

• Third, the Court of Appeals affirmed the District Court's summary judgment on petitioners' DCHRA hostile work environment claim in light of petitioners' failure to adduce any evidence other than that they were required to "adhere to established workplace policies." Pet. App. at 9a.

• And fourth, the Court of Appeals affirmed the District Court's ruling on petitioners' DCHRA claims of retaliation based on their receipt of an anonymous letter containing a black dot and on comments made by petitioner Campbell's supervisor. In so doing, the court below stated that petitioners did "not provide evidence to link the black-dot letters to NEA, nor [did] they provide details to clarify the context and substance of the comments by appellant Campbell's supervisor." Pet. App. 9a.

ARGUMENT

This is a fact-intensive case that does not warrant this Court's review.

A. To the extent that petitioners stated cognizable employment discrimination and retaliation claims, each was rejected by the District Court on the facts, and the District Court's rulings were affirmed by the Court of Appeals. That is true of *all* of petitioners' claims, including particularly the one set of claims that petitioners argue do generate a legal question—those involving negative comments in otherwise positive performance appraisals, attendance at certain conferences, denial of leave and excessive supervision. For those claims are fully disposed of by the Court of Appeals' alternative basis for upholding the District Court—that petitioners failed to establish a *prima facie* case of disparate treatment, Pet. App. 8a—a fact-specific holding that petitioners do not challenge here.

B. To be sure, in affirming the District Court, the Court of Appeals held too that under its decision in *Brown v. Brody*,

199 F.3d 446 (D.C. Cir. 1999), certain of NEA's actions here were not "adverse employment actions" violative of the District of Columbia Human Rights Act. And, petitioners argue that *Brown* and the instant case conflict with the decisions of other Courts of Appeals taking a broader view of what constitutes an "adverse employment action" violative of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. Petitioners' conflict claim is without substance.

In *Brown*, the District of Columbia Circuit held that a purely lateral transfer (*i.e.* a transfer involving no diminution in pay or benefits) is not an adverse employment action unless it is accompanied by other materially adverse consequences affecting the terms and conditions of employment, and that a "fully satisfactory" evaluation that is lower than normal is not an adverse employment action.[2] Here, the Court of Appeals relied on *Brown* in ruling that petitioners' claims that they received "negative comments on . . . otherwise positive evaluations," were not assigned to attend the conferences that they wished to attend, and suffered "minor" changes in professional responsibilities, were not sufficient to constitute adverse employment actions. Pet. App. at 8a.

While the general definitions of "adverse employment actions" in the Court of Appeals cases cited by petitioners, Pet. 8-18, are not perfectly uniform in all respects, the salient point is this—the NEA actions held not to be "adverse

---

[2] *See* 199 F.3d at 455-56 and cases cited therein ("clear trend of authority . . . is to hold that a 'purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action"); *id.* at 458 and n. 11 and cases cited therein ("[j]ust as lateral transfers do not ordinarily constitute 'adverse actions,' a similarly thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions").

employment actions" by the D.C. Circuit would *not* be held to be adverse employment actions in any circuit.

No circuit holds that a *positive* evaluation can constitute an adverse action simply because it contains some critical comments. The broadest view is that an *objectively negative evaluation* can constitute an adverse action under certain circumstances. *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

With respect to the conferences that petitioners would have preferred to attend, all the circuits agree that "mere idiosyncrasies of personal preference are not sufficient to state an injury." Pet. App. 8a, quoting *Brown*, 199 F.3d at 457. *See Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998) (finding "no case, in [the 11th] or any other circuit, in which a court explicitly relied on the subjective preferences of a plaintiff to hold that plaintiff had suffered an adverse employment action").

And, so far as petitioners show, or we have found, no circuit treats "minor changes in professional responsibilities" Pet. App. 8a, as rising to the level of an adverse employment action.

In sum, the treatment of the NEA actions at issue here by the court below is no different from that which would have obtained in any other circuit. Thus, whatever nuances there may be in the circuits' definitions of adverse employment actions are not revealed by and are not relevant to this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MAURICE JOSEPH
NATIONAL EDUCATION
ASSOCIATION
1201 Sixteenth Street, N.W.
Washington, DC 20036
(202) 833-4000

ROBERT M. WEINBERG
Counsel of Record
LAURENCE GOLD
PAGE KENNEDY
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Respondent National Education Association

March 9, 2001